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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION

United States District Court  
Southern District of Texas  
FILED

OCT 26 2000

Michael N. Milby  
Clerk of Court

EDWARD ALCALA, et al.,

Plaintiffs,

VS.

ALEX PEREZ, in his official capacity as  
Sheriff of Cameron County, Texas and  
Cameron County, Texas,

Defendants.

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CIVIL ACTION NUMBER

**B-96-203**

**PLAINTIFFS' OBJECTIONS TO THE REPORT  
AND RECOMMENDATION OF THE MAGISTRATE**

Plaintiffs hereby object to some of the Report and Recommendation of the Magistrate and in support of said objections would respectfully show the following:

1. Plaintiffs object to the factual and legal conclusion that employees who were employed on November 8<sup>th</sup>, 1993 and who were still employed after November 8<sup>th</sup>, 1996 and who had banked compensatory time accrued as of November 8<sup>th</sup>, 1993 are excluded by the FLSA three year statute of limitations.

2. At page 5, the court states that:

“plaintiffs in the instant case were never led to believe that they would be compensated for their volunteer time. Indeed, the facts of this case

affirmatively show that while the plaintiffs regularly received compensatory time for performing their normal duties, they were always on notice that no compensation would be given for time spent working as patrol officers. As such, plaintiffs' claim for hours worked accrued at each regular pay day immediately following the work during which the services were rendered." Citing, *Halferty*, 821 F.2d at 271.

3. Plaintiffs submit that this conclusion has FLSA policy and regulations backwards. The Report concludes in affect that because defendant unlawfully failed to pay for compensatory time for the "volunteer" time that was worked by jail personnel and the employees accepted this fact, then the employee somehow waived their claim to compensatory time even though this time was recorded. This simply buys whole hog the defendant's argument that noncompliance with the statute by the employer is a virtue which should be rewarded. Whether the employees accepted the fact, through ignorance or coercion, that they would not be paid compensatory time is irrelevant. The employer has the obligation to record time worked, to pay required overtime, and, employees may not waive their rights under the Fair Labor Standards Act.<sup>1</sup> *Brooklyn Savings Bank vs. O'Neil*, 324 U.S. 697 (1945).

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<sup>1</sup>Contrary to the Report's assertion at footnote 2 at page 5, *Christensen vs. Harris County*, 120 S.Ct. 1655 (2000) did not overrule *Heaton vs. Moore* as to the concept of "banking". In fact, *Christensen* accepted the notion that overtime earnings belonged to the employee. While *Christensen* does make it clear that a public employer may require an employee to take compensatory time before vacation time, *Christensen* by no means held that comp time cannot be in the bank or does not belong to the employee once earned. In fact, the *Christensen* court rejected the 5<sup>th</sup> Circuit's language to that effect in its opinion below.

4. Plaintiffs here were not attempting to “bust” the statute of limitations. Plaintiffs’ position is consistent with the implementing regulations and the Department of Labor’s interpretation of the concept of banking. All of the plaintiffs’ hours earned prior to November 8<sup>th</sup>, 1993 were in the bank on November 8<sup>th</sup> of 1993.

5. The Report completely ignores and gives no deference or even lip service or mention to the Department of Labor’s interpretation of the banking regulations under the FLSA as applicable to this case. The Department of Labor’s interpretation letter obviously supports the plaintiffs’ position and is directly on point and should have been given due deference, or at least not ignored.

6. Similarly, the Report ignores the regulations implementing the payment of compensatory time. 29 C.F.R. § 553.27. The focus of § 553.27(a) is not upon the accrual date of compensatory time but upon the point in time at which the employee receives payment. “Compensatory time earned ... may be made at any time and shall be paid at the regular rate earned by the employee at the time the employee receives the payment.” This has to be the case because compensatory time or pay is deferred remuneration. Comp time earned cannot always be taken or paid near the time that it is earned (and seldom is). Section 553.27 states that “upon termination of employment, an employee shall be paid for unused compensatory time earned after April 14<sup>th</sup>, 1986.” There is no limitation on when the comp time is earned just that it can be paid at any

time. The regulation does not address any accrual date other than April 14<sup>th</sup> of 1986. This is not inconsistent with the three year statute of limitation. Certainly if an employee left the public service with compensatory time in the bank, he or she would have to comply with the applicable statute of limitations to claim the banked time. In other words, termination from employment closes the account. In this case, we are not talking about employees who have left employment with the County and who would be barred if they had not made a claim within three years of termination. We are concerned with employees who were employed on November 8<sup>th</sup> of 1993 who had a rolling bank account of compensatory time and who were employed during the period November 8<sup>th</sup>, 1993 or after. Just because the defendant in this case did not keep adequate payroll records and did not designate volunteer time as compensable time (unlawfully) does not mean that the time was not earned and that it should not be paid for all employees who had accrued said time as of November 8<sup>th</sup>, 1993.

6. ***Halferty vs. Pulse Drug Co., Inc.***, 821 F.2d 261, 271 (5<sup>th</sup> Cir. 1987) cited in the Report is not inconsistent with the plaintiffs' position. ***Halferty*** was not applied in a compensatory time situation. A distinction should be made as to the accrual of a cause of action for FLSA purposes as to opposed to the accrual of compensatory time for FLSA purposes and when it is required to be paid.

**WHEREFORE**, plaintiffs pray that the Magistrate withdraw that portion of its Report and Recommendation relating to the disallowance of compensatory time for those plaintiffs who were employees on November 8<sup>th</sup> of 1993 who had accrued compensatory time and who were employed during the period November 8<sup>th</sup>, 1993 through November 8<sup>th</sup>, 1996 and reissue the Report consistent with the above.

Respectfully submitted,

BY: 

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**CERTIFICATE OF SERVICE**

I, GEORGE P. POWELL, do hereby certify that on this the 26<sup>TH</sup> day of October, 2000, I caused to be faxed and mailed a true and correct copy of Plaintiffs' Objections to Report & Recommendation of the Magistrate to defendants' attorney of record:

Mr. Richard O. Burst  
**Legal Division Commissioners' Court**  
964 E. Harrison St.  
Brownsville, TX 78520



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GEORGE P. POWELL